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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,

v.

UNITED STATES FOOTBALL LEAGUE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a jury's specific finding that antitrust plaintiffs had been injured by the defendants' unlawful monopoly entitle the plaintiffs to an award of treble damages, costs, and reasonable attorneys' fees under the plain language of Section 4 of the Clayton Act, 15 U.S.C. § 15?

2. Did the Court of Appeals, consistent with Section 4 of the Clayton Act and governing case law, properly hold that the District Court did not abuse its discretion in refusing to reduce the fees requested by antitrust plaintiffs by more than 30%, in light of the time and labor required, the novelty and difficulty of the issues, the skill required of counsel, comparison with customary fees, time limits imposed by circumstances, experience, reputation, and ability of counsel, the results achieved and the plaintiffs' voluntary decision not to seek recovery for almost $2 million of fees and expenses which were reasonably incurred in the course of prosecuting the action?

RULE 28.1 LIST

Pursuant to Rule 28.1, the following corporations are either parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates of any respondent that is a corporation: USFL Holdings, Inc.

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v.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, the United States Football League and certain of its Member Clubs (the "USFL"), respectfully submit this brief in support of their request that this Court deny the petition of the National Football League, *et al.* (the "NFL") for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered October 10, 1989.

INTRODUCTION

The NFL's petition for a writ of certiorari does not present any special and important reasons for the Court to review the decision of the United States Court of Appeals for the Second Circuit in this case. The unanimous Second Circuit affirmance applies straightforward and well-settled principles of

antitrust law and the law of attorneys' fees. Its decision is consistent with the decisions of this Court and other circuit courts. Even the NFL does not claim that there is a conflict among the circuits. The case is thus not worthy of review by this Court.

In seeking Supreme Court review, the NFL is attempting to avoid the Congressionally-mandated consequences of a specific jury finding that it illegally monopolized the market for major league professional football in the United States, and that this monopoly injured the USFL. In holding the NFL liable, the jury found (1) that the NFL had willfully acquired or maintained monopoly power in a relevant market consisting of major league professional football in the United States, and (2) that the NFL's unlawful monopoly of the relevant market had caused injury to the business or property of the plaintiffs, the USFL.

In light of these specific jury findings of unlawful monopolization and injury, the Court of Appeals quite properly ignored the NFL's arguments with respect to the USFL's alleged improper motives. This was particularly appropriate given that the NFL's lengthy motion for judgment notwithstanding the verdict was denied by the District Court, and the liability issue was not seriously pursued by the NFL on appeal, with the result that the NFL now stands before this Court as an adjudicated illegal monopolist.

As the lower courts found, Section 4 of the Clayton Act spells out the clear consequences of such findings. Section 4 states: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . *shall recover* threefold the damages by him sustained, and the cost of suit, *including a reasonable attorney's fee*" (emphasis added). As this Court and all other courts to consider this issue have held, the award of attorneys' fees is *mandatory* once these, and only these, findings of unlawful monopolization and injury have been made. There is simply no basis for the NFL's argument that proof of damages is yet an additional requirement. Moreover, although the NFL's

public policy arguments are unpersuasive and irrelevant in light of the plain meaning of the statute, the Court of Appeals quite properly held that "[b]ecause of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney's fees must be sustained regardless of the amount of damages awarded" (A8).[1] As the Second Circuit concluded: "What is important is encouraging the detection and cessation of anticompetitive behavior, not the amount of damages found." *Id.*

The decisions of the District Court and the Court of Appeals in this case with respect to the amount of fees are equally consistent with governing case law. As the District Court found, this was an "extremely complex action involving unique issues" which "proceeded at a breakneck pace." *USFL v. NFL*, 704 F. Supp. 474, 485 (S.D.N.Y. 1989). The Court of Appeals gave the District Court's discretionary findings the deference that is required by this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).[2] The Court of Appeals properly upheld the District Court's award and its reduction of the lodestar by thirty percent, particularly in light of the fact that, as the District Court concluded, the USFL already had reduced voluntarily its request by twenty percent, had charged historic billing rates, rather than current billing rates, and had understated the time actually spent on the litigation. Although the NFL complains further that the USFL was awarded fees for time spent on unsuccessful matters, the Court of Appeals, once again engaging in an appropriate application of the *Hensley* decision, concluded that all of the USFL's claims involved "common core of facts" and are "based on related legal theories." 461 U.S. at 435 (1983).

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[1] Citation to the unreported Second Circuit opinion in *USFL v. NFL*, No. 1265, August Term, 1988 (2d Cir. 1988), which is set out in Appendix A to the NFL's petition, is in the form "A ___."

[2] As explained in greater detail below (see pp. 15-18 *infra*), the decision in *Hensley* is relevant to the amount of reasonable fees to be awarded under Section 4 of the Clayton Act but not to whether a plaintiff suing under Section 4 of the Clayton Act is entitled in the first instance to an award of fees.

Together these resulted in the finding of injury to the USFL (A12-A13). The NFL's petition in effect asks this Court to review the entire 12,000 page transcript of this case and to overturn a fact-based decision made twice by the District Court (on the merits and in awarding fees) and again by the Court of Appeals in affirming the District Court's fee award.

In short, the Second Circuit's straightforward application of the governing case law presents no issue worthy of review by this Court.

STATEMENT OF THE CASE

A. The Litigation On The Merits

The USFL commenced this action in 1984, alleging that the NFL's unlawful monopolization of major league professional football had prevented the USFL from competing effectively in the professional football industry. As observed by the District Court, the "litigation proceeded at a breakneck pace, as required by the Court's scheduling orders." *USFL v. NFL*, 704 F. Supp. 474, 485 (S.D.N.Y. 1989).

After several months of preliminary skirmishing, discovery began in earnest on an expedited track, which led to a trial less than one year following its commencement. The District Court personally supervised this discovery, declining to refer discovery matters to a magistrate, and frequently heard the parties on short notice throughout the discovery period. Throughout the summer and fall of 1985, the parties exchanged and reviewed hundreds of thousands of documents and conducted over fifty depositions, often on multiple tracks, at which over 2,000 exhibits were marked. The parties' cross-motions for summary judgment, extensive briefing of numerous evidentiary issues, and preparation of an exhaustive pretrial order occupied the full attention of all counsel throughout the winter and early spring of 1986. The complexity of this action was enhanced by the unique nature of many of the central issues, including the existence of an antitrust

exemption peculiar to the industry and the interrelationships between a professional football league and its member teams, players, stadiums, potential markets, and the purchasers of its product. Moreover, the NFL's superior financial resources were deployed so as to impose enormous litigation burdens on the USFL, whose lead counsel was opposed by no fewer than three blue-chip firms representing the NFL.[3]

The trial began on May 14, 1986. Over the next two and one half months, the parties called 43 witnesses, filled over 7,000 pages of transcript, and filed over 130 briefs on difficult issues of antitrust and evidence law, many on short notice. When the litigation was over, the USFL had obtained one of the most difficult results in all of antitrust litigation: a private plaintiff, acting without benefit of prior adjudications or assistance from the Justice Department, secured the judicial finding that an entire industry had been illegally monopolized in violation of Section 2 of the Sherman Act, and established further that it had been injured by this unlawful monopolization. Nonetheless, the jury awarded the USFL only nominal damages of $3 after statutory trebling for its victory on its broad Section 2 monopolization claim, and found for the NFL on the remaining counts.

After trial the NFL moved for judgment notwithstanding the verdict, contending that in light of the jury's other findings its verdict for the USFL could not stand. In rejecting this motion and holding that the USFL had in fact proved a relevant market, the NFL's monopoly power in that market, predatory conduct in this market, and resulting injury, the District Court cited to extensive record proof of the NFL's anticompetitive conduct and the resulting effect of that conduct on the USFL.

The District Court thus explicitly rejected the NFL's contention that the jury's failure to find liability on the television-specific claims meant that television issues were irrelevant to

[3] Published reports indicate that the NFL spent $26 million defending this action, an amount nearly five times the District Court's award to the USFL.

the USFL's victory. In addition, the District Court noted that the NFL's television-related behavior was relevant to " 'the purpose and character' of the remainder of NFL conduct under the jury's scrutiny," *USFL v. NFL*, 644 F. Supp. 1040, 1058 n.15 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988), and cited a litany of conduct supporting the jury's finding of predatory actions. 644 F. Supp. at 1058. These findings were not disturbed on appeal.[4] Thus, the NFL's repeated suggestion—made throughout its petition—that the television evidence did not bear on the findings of monopolization is contradicted by the record. Moreover, this specific argument was rejected both by the District Court in its decision on the fee petition, *USFL v. NFL*, 704 F. Supp. 474, 480-81 (S.D.N.Y. 1989), and by the Court of Appeals when it affirmed that award (A9-A10, A12). The NFL's illegal monopolization and liability therefore are at this stage a given; the only issue to be addressed—and which the District Court and the Second Circuit have amply addressed—is that of the award of attorneys' fees.

B. The Fee Award

Following the Second Circuit's affirmance of the jury verdict, *USFL v. NFL*, 842 F.2d 1335 (2d Cir. 1988), the USFL filed the appropriate motion papers accompanied by detailed affidavits supporting the award of fees and costs. The NFL received substantial discovery from USFL counsel relating to the request, and the issues were fully briefed. As the District Court recognized, the NFL did not challenge the reasonableness of the hourly rates charged by the USFL and did not assert that the time expended on any specific element of

[4] The NFL filed a so-called "conditional" cross-appeal from the jury's finding of an unlawful NFL monopoly that injured the USFL, but asked that this cross-appeal be considered only if the Second Circuit had declined to affirm the jury's verdict and the judgment *for the USFL* entered thereon. Since the NFL chose to make the cross-appeal conditional it cannot now be heard to complain—as it implies throughout its brief—that the evidence supporting the finding of unlawful monopolization should be reexamined.

the litigation was not reasonably spent. *USFL v. NFL*, 704 F. Supp. 474, 485 (S.D.N.Y. 1989). These concessions belie the NFL's present contentions (Petition, pp. 13, 20) that somehow plaintiffs engaged in unnecessary discovery and motion practice and prolonged the trial.

The District Court's final award of attorneys' fees totalled $5,529,247.25, and the Court also awarded costs totalling $62,220.92. This award was over two million dollars below the $7,662,702.13 sought by the USFL. As the District Court itself recognized, the $7.7 million request itself was "somewhat lower that it legitimately could have been." 704 F. Supp. at 486, in light of the fact that the USFL charged historic rather than current rates, understated time, and eliminated questionable time. All told, the USFL voluntarily reduced the lodestar by 20% or nearly $2 million. Although Judge Leisure rejected the NFL's claim that the fee request had not been properly documented, he did reduce the award by 10% as a consequence of vague or ambiguous time entries. The NFL no longer challenges the 10% reduction for vagueness.

Turning to the merits of the USFL's petition, the District Court held that the USFL was entitled to an award of fees. Noting that "[t]he NFL concedes, as it must, that a prevailing antitrust plaintiff is entitled to attorneys' fees under Section 4 of the Clayton Act," 704 F. Supp. at 478, the Court concluded that "the jury's finding of injury and an antitrust violation precludes the NFL's arguments that the USFL was not a prevailing party." *Id.* at 480. The District Court rejected the NFL's attempt to read additional requirements into Section 4, holding that statutes mandating the award of attorneys' fees, such as Section 4, are not governed by the "prevailing party" standard of *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The "prevailing party" standard applies to statutes which, *unlike* the Clayton Act, use the term "prevailing party" and also make the award of attorneys' fees

discretionary with the Court. 704 F. Supp. at 478-79.[5] The District Court also held that Section 4 did not require the USFL to prove a specific amount of damages in order to recover attorneys' fees. The District Court noted that such an interpretation was at odds with the "host of cases" awarding attorneys' fees after a recovery of nominal damages. *Id.* at 479-80. The District Court thus concluded that "[t]he award of counsel fees itself is therefore a non-issue." *Id.* at 480.

Notwithstanding the USFL's voluntary reductions, however, the District Court carefully considered all the factors required by governing case law and held that in light of the USFL's limited success, the Court was obliged to reduce the USFL's fee by an additional 20%, on top of the USFL's voluntary concessions and his earlier 10% reduction for the partially vague time entries. 704 F. Supp. at 486. The USFL was, however, awarded full fees for the time spent prosecuting the fee application.

C. The Court of Appeals' Affirmance

On appeal to the Second Circuit, the NFL raised four basic arguments, each of which was rejected unanimously by the Court. First, the NFL argued that the USFL was not entitled to fees under Section 4 of the Clayton Act. The Second Circuit, however, agreed with the District Court that "[t]he award of counsel fees itself is . . . a non-issue." (A10, *quoting* 704 F. Supp. at 480). The Second Circuit concluded under the plain meaning of Section 4 that since the jury in this case found that the NFL's monopolization of the United States major professional football market injured the USFL, the awarding of attorneys' fees to the USFL was mandatory. (A7.) The Court regarded the NFL's reliance on the "pre-

[5] However, *Hensley* and other civil rights cases are relevant to determining the *amount* of a reasonable fee, since in passing Section 1988, Congress intended that the amount of fees awarded be governed by the same standards as other complex federal litigation, such as antitrust cases. See *McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983); S. Rep., No. 94-1011, p. 6 (1976), 1976 U.S. Code Cong. & Admin. News 5908, 5913.

vailing party" standard of *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), as misplaced because (1) there is no requirement in Section 4 of the Clayton Act that an antitrust plaintiff be a "prevailing party" to recover attorneys' fees, and (2) *Hensley* involved an award of attorneys' fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, which provides for the *discretionary* award of fees. The Court recognized that the award of only nominal damages to the USFL did not affect the right to fees and concluded that the award of fees vindicated important public policies of encouraging private parties to bring antitrust actions (A8-9). The Court also rejected the NFL argument that proof of damages resulting from the NFL's monopolization of television contracts had no impact on the jury verdict and concluded instead "[i]t is at least plausible that the evidence of the damages from television-related conduct influenced the jury's finding of generalized monopolization damages." (A10.)

The second focus of the NFL's appeals was to challenge the amount of the fee award. The Court rejected each of the NFL's arguments with respect to this issue. The Court recognized that the District Court had discretion with respect to the amount of the award, that it considered the relevant factors, and that it therefore acted within its discretion. (A10-A15.) The Court held that the twenty percent reduction on top of the previous ten percent reduction for vagueness reflected an appropriate consideration by the District Court of the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (A13-A15). The Court also recognized that the USFL was entitled to the attorneys' fees relating to the television contract claim, allegations dismissed before trial, and unsuccessful collateral matters because all such work related to the common core of facts that resulted in the successful proof of antitrust injury. (A11-A15.)

The NFL apparently has now abandoned its third and fourth arguments in the Second Circuit—that compensation for paralegal time and the award of out-of-pocket expenses

was improper. The Second Circuit held that the award of paralegal fees correctly foreshadowed the Court's decision in *Missouri v. Jenkins*, 57 U.S.L.W. 4735 (U.S. June 19, 1989), and that the award of expenses was appropriate in light of the decision in *Reichman v. Bonsignore Brignati & Mazzotta P.C.*, 818 F.2d 278, 283 (2d Cir. 1987).

REASONS FOR DENYING THE WRIT

The rulings of the District Court and the Court of Appeals are entirely consistent with the uniform holding of the courts (1) that the award of attorneys' fees to the antitrust plaintiff who proves anticompetitive conduct and injury is mandatory, and (2) that the amount of fees awarded lies within the sound discretion of the District Court. Petitioners have cited no authority to the contrary, and have presented no special and important reasons why the unanimous affirmance by the Court of Appeals should be reviewed by this Court.

1. *The Courts Have Consistently And Properly Awarded Attorneys' Fees To Plaintiffs Like The USFL Who Have Proven Antitrust Injury*

Determining whether an antitrust plaintiff is entitled to recover its costs and attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15, is a simple matter. Section 4 states explicitly, "[A]ny person *who shall be injured* in his business or property by reason of anything forbidden in the antitrust laws . . . *shall recover* threefold the damage by him sustained, *and the cost of suit, including a reasonable attorney's fee*" (emphasis added). The jury in this action was instructed that to hold the NFL liable to the USFL for unlawful monopolization, it had to find (1) that the NFL possessed monopoly power in a relevant market; (2) that the NFL knowingly acquired or maintained this power; (3) that this power was acquired or maintained through anticompetitive conduct; and (4) *that this conduct injured the USFL*. The jury expressly found each of these four elements, thereby entitling the USFL to treble damages, costs, and attorneys' fees under Section 4 of the Clayton Act.

The law is clear that the courts lack discretion to deny attorneys' fees to an antitrust plaintiff who has proved the foregoing elements. Thus, in *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240, 261, this Court concluded:

> "Under the antitrust laws, . . . allowance of attorneys' fees to a plaintiff awarded treble damages is *mandatory*." (footnote omitted; emphasis added)

Accord, e.g., Christianburg Garment Co. v. EEOC, 434 U.S. 412, 415 & n.5 (1978); *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *Hydrolevel Corp. v. American Soc. of Mechanical Engineers*, 635 F.2d 118, 130 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982); *Baughman v. Cooper-Jarret, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). As the Second Circuit concluded in its opinion in this case: "An injury having been found, the awarding of attorney's fees to the USFL was compulsory" (A7).

In short, there is no support in the cases or the language of the statute for the NFL's argument (Petition, pp. 16-18) that damages must be proven. Indeed, nominal damages were awarded, and, as the Court of Appeals correctly concluded, "[t]he award of only nominal damages to the USFL does not affect its right to attorneys' fees" (A7). *Accord, e.g., Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *Rosebrough Monument Co. v. Memorial Park Cemetary Ass'n*, 666 F.2d 1130, 1147 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 390 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974). Indeed, for all the NFL's rhetoric on this issue, *it cannot cite a single private action under Section 4 where attorneys' fees to a plaintiff which recovered nominal damages were denied.* No court has misread or rewritten the Clayton Act in the manner urged upon this Court by the NFL.

The NFL attempts to escape these clear holdings by arguing that the so-called "prevailing party" test of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), applies here. The Court of

Appeals properly rejected this argument for two reasons (A8-A9). First, there is no requirement in Section 4 of the Clayton Act that an antitrust plaintiff be a "prevailing party" to recover attorney's fees. The term "prevailing party" appears nowhere in Section 4 of the Clayton Act. All that is required is an injury. Second, *Hensley* involved the award of attorneys' fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1982), which provides, in pertinent part, that "the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (emphasis added.) Here, on the other hand, the award of attorneys' fees was mandatory since liability was found. Therefore, *Hensley* is irrelevant to the issue of entitlement to fees.

Indeed, this Court itself has recognized the distinction between mandatory and discretionary fee-shifting statutes. As the Court observed in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 415-16 (1978), in contrasting by specific citation mandatory statutes such as Section 4 of the Clayton Act with discretionary statutes such as the Civil Rights Act of 1964:

> "Some of these statutes make fee awards mandatory for prevailing plaintiffs; others make awards permissive but limit them to certain parties, usually prevailing plaintiffs. But many of these statutes are more flexible, authorizing the award of attorney's fees to either plaintiffs or defendants, and entrusting the effectuation of statutory policy to the discretion of the district courts." (footnotes omitted.)

This Court made the same critical distinction in *Alyeska Pipeline Service Co. v. The Wilderness Soc.*, 421 U.S. 240, 260-62 (1975).

In short, the NFL's "prevailing party" argument can only be made to Congress; this Court cannot amend the Clayton Act to change its criteria for the entitlement to fees to those found in some other statute, such as Section 1988.[6] This Court

[6] In contrast, Section 16 of the Clayton Act, 15 U.S.C. § 26, authorizes fees to a plaintiff who "substantially prevails" in an action for injunctive relief. While the NFL relies on Section 16 (Petition, pp. 16-17), in fact, the

has emphasized repeatedly that it has "no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978). *Accord, e.g., United States v. Locke*, 471 U.S. 84, 95 (1985). Since the NFL's petition seeks just such a substitution of the Court's views for that of Congress, it should be denied.

2. ***The Award Is Consistent With Public Policy***

As the above analysis of the governing statute and uniform case law makes clear, the NFL's challenge to the USFL's motives in filing suit is simply irrelevant to the USFL's entitlement to fees for proving that the NFL is an illegal monopoly which had injured the USFL. Nonetheless, as the decisions awarding fees where there is a finding of injury have emphasized, the award of fees in this case in fact vindicates important public policies.

Although the NFL relies heavily on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (Petition, p. 19), that decision in fact supports the USFL's position, and not that of the NFL. *Brunswick* holds that

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 789 (emphasis in original).

In this case, the jury answered a specific interrogatory directed at this issue and found that the NFL's acts had injured the USFL.

Thus, as the Court of Appeals in this case recognized, the award of fees is consistent with the public policy underlying the antitrust laws. The Court concluded:

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use of different language in Section 16 from Section 4 supports the USFL's position and not that of the NFL because it demonstrates that it is up to Congress, and not the courts to decide the appropriate test for the award of fees.

> "What is important is encouraging the detection and cessation of anticompetitive behavior, not the amount of damages found. Because of the importance of the policy of encouraging private parties to bring antitrust actions, recovery of their reasonable attorney's fees must be sustained regardless of the amount of damages awarded." (A8.)

Other decisions are to the same effect. *See, e.g., Kelco Disposal Inc. v. Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir. 1988), aff'd, 109 S. Ct. 2909 (1989); *Home Placement Service, Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n.2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). No decision is to the contrary.

The NFL argues that the USFL's alleged bad faith and alleged improper motives should have been considered (Petition pp. 13-14). Without belaboring the invalidity of the NFL's contentions, it cannot be denied that alleged improper motives are relevant only to the extent they negate either injury or damage causation; otherwise, they would constitute an impermissible unclean hands defense. *See, e.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1986); *Kiefer-Steward Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 214 (1951); *USFL v. NFL*, 842 F.2d 1335, 1369 (2d Cir. 1988). In this case, therefore, the NFL's entire argument is inconsistent with the jury's finding of antitrust injury. In the portion of the jury charge relating to antitrust injury, the jury was told that it could consider the NFL's "mismanagement" and "merger motive" evidence to show that the USFL's wounds were entirely self-inflicted. The jury's finding of antitrust injury in answering a specific interrogatory means that it considered and rejected these arguments by the NFL. Thus there is no factual predicate for the NFL's arguments with respect to the USFL's motives. As the District Court held in rejecting the argument that the veracity and motivations behind the lawsuit should have been reexamined in adjudicating the amount of fees to be awarded, "[T]he NFL ignores the fact that it was decisively, unquestionably, found to have violated the antitrust laws." *USFL v.*

NFL, 704 F. Supp. 424, 485 (S.D.N.Y. 1989). In light of these jury findings, and the District Court's thorough review of the record, there is no basis for requiring this Court to review a 12,000 page record to reexamine the USFL's motives.

3. *The Amount of the Award Is Within the District Court's Discretion*

This Court has emphasized that "the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The findings of the district court cannot be set aside unless clearly erroneous. *City of Riverside v. Rivera*, 477 U.S. 561, 572-73, 584 (1986) (plurality opinion; Powell, J., concurring); see *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Great deference to the lower courts' findings is especially appropriate in this action. The Second Circuit recognized throughout its opinion the District Court's thorough and proper handling of the case. The District Court presided over this case from its inception, maintaining hands-on, personal control of the action from the start of discovery through the jury verdict. The District Court's familiarity with the entire course of proceedings and first-hand observation of counsel left the District Court uniquely qualified to analyze fee-related issues, such as the interrelationships among claims advanced by the USFL and the effort required to bring this complex action from the filing of the amended complaint through to a jury verdict in less than fifteen months. The NFL's attempt to persuade this Court to wade through a record of 12,000 pages to relitigate these issues should be rejected.

A. The District Court Applied The Proper Standard In Evaluating the Fee Application

In its petition for certiorari, the NFL argues for the first time in this litigation for there to be a so-called "rational re-

lationship between the fee award and the result obtained" (Petition, pp. 9-10). Even the NFL did not make such an argument in the lower courts.

Rather, the NFL's brief to the Second Circuit conceded that "[t]he fee determination starts with a calculation of the lodestar: "the number of hours reasonably expanded on the litigation multiplied by a reasonable hourly rate" (NFL Second Circuit Brief at 26, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). *Accord, e.g., Blum v. Stenson*, 465 U.S. 886, 888 (1984). In this case, the NFL did not challenge the reasonableness of the hourly rates claimed by the USFL, nor did it assert that any of the USFL's hours were not reasonably spent. *USFL v. NFL*, 704 F. Supp. 474, 484 (S.D.N.Y. 1989). There can also be no serious doubt that the District Court applied the twelve relevant factors in determining whether to adjust the lodestar amount set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and approved by the Supreme Court in *Hensley*. 461 U.S. at 430 & n.3.[7] Of these, only a portion of one of the twelve factors, the results obtained, pointed to a lower than maximum fee award. As the Court of Appeals recognized in affirming the amount of the 30% reduction that the District Court in fact imposed, the District Court considered the relevant factors in determining the amount it would reduce the fees as a consequence of the results, including (1) the USFL's voluntary reduction of 20% in the amount of fees sought, (2) the USFL's decision to charge historic rather than current rates, and (3) the USFL's understatement of time (A14). There is no basis in law or policy for adding another

[7] The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

factor, that of the Court's subjective interpretation of plaintiffs' motives in filing suit, to the fee issue.

In arguing that the Court of Appeals and the District Court should have engaged in a different framework of analysis, the NFL distorts the decisions in both *Hensley* and *City of Riverside v. Rivera*, 477 U.S. 561 (1986). *Rivera* in fact affirms a fee award totalling $245,456.25—representing full compensation at $125/hour for every single hour spent on the litigation. Justice Powell's concurring opinion in fact turns on the discretion appropriately placed on the district court and explicitly rejects petitioners' argument for a "rule of proportionality between the fee awarded and the damages recovered." 477 U.S. at 581-86. Justice Rehnquist's dissent focuses on what it regards as the unwarranted amount of time respondents' lawyers spent on the case. 477 U.S. at 588-96. No such claim is made in this case. Moreover, the suggestion that *Hensley* stands for the proposition that "the result is what matters" (NFL Petition, p. 12) is absurd. In fact, as described above, *Hensley* supports the application of the very criteria applied here by the lower courts, see 461 U.S. at 429-432, and was specifically relied upon by the District Court, *see* 704 F. Supp. at 486, as the basis for its reduction. The specific reference to results in *Hensley* is preceded by the observation that, "[l]itigants in good faith may raise alternative grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." 461 U.S. at 435. Of course, as described below (see pp. *infra*), this conclusion from *Hensley* itself supports the refusal of the Court of Appeals to hold that the District Court's award constituted an abuse of discretion.

4. *The Lower Courts Did Not Err In Their Assessment Of The Issues That Contributed To The USFL's Victory*

The NFL continued to claim that the District Court failed to exclude from its award fees for time spent on what it regards as "collateral matters" (Petition, pp. 14-15). As an initial matter, the NFL's argument is fatally flawed because, as stated by the District Court, 704 F. Supp. at 481, even though

the NFL had complete access to the original computer runs of the USFL's billable time, and adequate opportunity for a comprehensive review of that material, it did not identify any time devoted exclusively to these allegedly non-compensable activities. Thus, as this Court held in *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984), the NFL's contentions are insufficient as a matter of law because the NFL failed to submit "*evidence* challenging the accuracy and reasonableness of the hours charged" (emphasis added) in order to create an issue of fact sufficient to require an evidentiary hearing.

Moreover, both the District Court and the Court of Appeals applied the relevant test—which is whether all the work done was "in relation to the common case of facts that resulted" in antitrust injury to the USFL and were "based on related legal theories" (A12-A13). See *Hensley v. Eckerhart*, 461 U.S. 424, 435-37 (1983). With respect to the television claim, both courts properly concluded that, as the Court of Appeals put it, "the television damage claim was related to the general claim of monopolization of the professional football market in the United States" (A12). As the District Court stated on more than one occasion, the rejection of Section 1 television claims did not mean that the jury did not consider such evidence as probative of the purpose and character of the remaining NFL conduct. *USFL v. NFL*, 644 F. Supp. 1040, 1058 & n.15 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (1988); *USFL v. NFL*, 704 F. Supp. at 480. Similarly, as the Court of Appeals concluded, the work done in relation to certain allegations that were dismissed before trial was properly included "because it was related to the same claim upon which the USFL eventually prevailed" (A12).

The NFL has presented no explanation of why there are "special and important reasons" within the meaning of Rule 17 why this court should devote its limited resources to scouring a 12,000-page record to reconsider lower court determinations of issues of this sort.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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